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(1)

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 474

SAM ORMONT, INDIVIDUALLY, AND DOING BUSINESS
AS ACME MEAT COMPANY, PETITIONER

v.

EARL W. CLARK, DIRECTOR OF THE DIVISION OF
LIQUIDATION, DEPARTMENT OF COMMERCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 50-51) has not yet been reported. The opinion adopted part of the same court's opinion (pp. 6-8) filed the same date in *Superior Packing Company v. Clark*, E. C. A. No. 276, a copy of which has been lodged with the Clerk of this Court.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered on November 10,

1947 (R. 52). The petition for a writ of certiorari was filed on December 10, 1947. The jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, as amended (50 U. S. C. App., Supp. V, 924 (d)), making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. 347).

QUESTION PRESENTED

Whether Revised Maximum Price Regulation No. 169—Beef and Veal Carcasses and Wholesale Cuts, as amended, was invalid *ab initio* because neither the regulation itself nor any of the amendments thereto issued before June 30, 1945, was approved by the Secretary of Agriculture prior to its issuance.

STATEMENT

Revised Maximum Price Regulation No. 169 established maximum prices for sales of beef and veal carcasses and wholesale cuts. Petitioner, a slaughterer of livestock, is under indictment for conspiracy to violate RMPR 169 during the period May 1, 1944, through June 30, 1946 (R. 22; S. D., Calif., No. 19094). Pursuant to leave granted by the District Court (R. 16-18), petitioner filed a complaint in the United States Emergency Court of Appeals under Section 204 (e) of the Emergency Price Control Act of 1942, as amended (R. 1-6), seeking a declaration by that court that RMPR 169, as amended from time

to time, was invalid during the period of the alleged violations.¹

On respondent's motion to dismiss (R. 21), the court below dismissed the complaint, holding, for the reasons elucidated in the *Superior Packing Company case, supra*, that beef and veal carcasses and wholesale cuts were not "agricultural commodities" within the meaning of Section 3 (e) of the Emergency Price Control Act of 1942, *infra*, p. 9, and, accordingly, that before the amendment of that section on June 30, 1945, approval by the Secretary of Agriculture was not required for the validity of the Price Administrator's regulation establishing maximum prices therefor (R. 50-51).

ARGUMENT

1. The petition should be denied for the reason that it presents no issue of constitutional law nor any federal question of significance.

Section 3 of the Emergency Price Control Act of 1942, entitled "Agricultural Commodities," contained certain precise, technical provisions de-

¹ The complaint also sought a declaration of invalidity as to RMPR 148—Dressed Hogs and Wholesale Pork Cuts (7 F. R. 8609), RMPR 239—Lamb and Mutton (7 F. R. 10688), MPR 389—Ceiling Prices for certain Sausage Items at Wholesale (8 F. R. 5903), and MPR 398—Variety Meats and Edible By-Products at Wholesale (8 F. R. 6945), together with their amendments. The contention with respect to these regulations, however, has been abandoned in the petition for a writ of certiorari. It appears that RMPR 169 is the only regulation involved in the enforcement action (Pet. 17, 23).

signed to assure certain minimum prices to farmers. When RMPR 169 and its first fifty-five amendments were issued, Section 3 (e) read:

* * * no action shall be taken under this Act by the Administrator or any other person with respect to any agricultural commodity without the prior approval of the Secretary of Agriculture * * *.

The sole issue here presented is whether beef and veal carcasses and wholesale cuts are "agricultural commodities" within the meaning of this provision. This is a narrow question of technical statutory construction, with no broad implications.

The only other case in which this issue has ever been presented is the *Superior Packing Company* case, *supra*, which was finally disposed of on November 10, 1947. It is most unlikely that the question could be raised again.

The Supplemental Appropriation Act, 1948,² amended Sections 203 (a) and 204 (e) of the Emergency Price Control Act of 1942 to provide new periods of limitation within which review of the validity of maximum price regulations or orders might be sought. The time for filing protests with the Department of Commerce under Section 203 (a) expired on September 29, 1947. There are no protests or complaints now pending involving the issue in this case. Civil enforcement actions for damages for violations of RMPR 169

² P. L. 271, 80th Cong., 1st sess., July 30, 1947. (Appendix, *infra*, pp. 10, 11.)

prior to final decontrol of meat on October 15, 1946³ have already been barred by the one-year limitation on such actions prescribed in the Act. (Sec. 205 (e), Appendix, *infra*, pp. 12-13). Review of the validity of regulations by direct complaint to the Emergency Court of Appeals under Section 204 (e) of the Act is now impossible in connection with all enforcement actions, civil and criminal, pending on July 30, 1947, when the Supplemental Appropriation Act was passed, providing a sixty day limitation for requesting leave to file complaints in the Emergency Court of Appeals in connection with such pending actions. Thus, there is at most a remote theoretical possibility that the issue presented in the present case might be raised in connection with a criminal action instituted in the future.⁴ If the defendant in such an action were to apply to the enforcement court for leave to file a complaint with the Emergency Court of Appeals, such leave could be granted only if the

³ Amendment 64 (11 F. R. 12093) to Supplementary Order No. 132, 10 F. R. 14954.

⁴ Since the language of Sections 1 (b) and 204 (e) of the Emergency Price Control Act, of the Supplemental Appropriation Act, 1948, and Executive Order No. 9841 (12 F. R. 2645) is somewhat ambiguous, it is impossible to state unequivocally whether the question might ever be raised in the course of litigation involving livestock subsidies contested by the Reconstruction Finance Corporation because of violations of OPA regulations (Defense Supplies Corporation Livestock Slaughter Payments Regulation No. 3, 8 F. R. 10826, as amended and revised, C. F. R., 1945 Supp., Tit. 32, sec. 7003).

court were to make precise findings of good faith and "reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a)" (Sec. 204 (e), Appendix, *infra*, p. 11). We submit that the probability of all these conditions coexisting at this time, more than a year after decontrol, is very slight.⁵

2. The decision of the court below is clearly correct. The basis of decision was summarized in the *Superior Packing Company* case, *supra*, as follows (slip opinion, p. 6):

A live steer is an "agricultural commodity", produced on a farm and sold by a farmer in its raw, natural or unprocessed state. A beef carcass, a wholesale cut, retail cuts such as steaks or roasts, beef brains, kidneys, hearts, livers, or other edible by-products, as well as meat products resulting from still further processing, such as sausages—these are all distinct commodities not produced on the farm and sold by farmers. They are not "agricultural com-

⁵ It is possible, under the terms of Section 204 (e) of the Act, that a decision in the instant case declaring RMPR 169 to have been invalid because not approved by the Secretary of Agriculture prior to its issuance might require the dismissal of other pending enforcement actions charging violations of RMPR 169 during the period of declared invalidity. We submit, however, that the Court should not entertain jurisdiction over a case because of the possibility that a judgment might have the incidental effect of benefitting unknown parties who failed to pursue their readily available remedies.

modities", but commodities "processed or manufactured in whole or substantial part" [Sec. 3 (e), as amended June 30, 1945 (Appendix, *infra*, p. 9)] from an agricultural commodity, the live steer. The slaughterer's operation of producing these various meat products would be described as a processing operation in the everyday use of words, and it certainly is such from the point of view of the steer.

As the court below also pointed out, if there were any possible ambiguity in the words used in the statute, the legislative history, which is reviewed by the court in the *Superior Packing Company* case, *supra*, and by respondent in the motion to dismiss the complaint (R. 27-34), is replete with evidence that the term "agricultural commodity" in Section 3 of the Emergency Price Control Act was not intended to embrace meat.

The reasonable contemporaneous interpretations of the Act by both the Price Administrator and the Secretary of Agriculture (see R. 24-25) should not be disturbed at this time. *Bowles v. Seminole Rock and Sand Company*, 325 U. S. 410.

Petitioner's argument that the decision of the court below is erroneous because allegedly in conflict with the Price Administrator's definitions in the regulation objected to (Pet. 16, 22-23), is specious. For the purposes of the regulation, the Price Administrator provided that beef and veal carcasses and cuts were not to be deemed "proc-

essed products." All this amounted to was a statement that they were not to be considered "processed beef and/or veal;" it did not alter or affect the basic fact that beef itself is "processed steer" and veal is "processed calf." Processing of a live animal yields a carcass, a hide, horns, hooves, offal, various internal organs, etc. Each of these individual products of the processing of the steer may be further processed. That petitioner was a "non-processing" slaughterer meant only that he did not to any substantial degree further process the products resulting from the processing, i. e., the slaughtering, of the steer or calf.

CONCLUSION

The decision below is correct and there is no warrant for review of the question presented by the petition. The petition should, therefore, be denied.

Respectfully submitted.

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JANUARY 1948.

APPENDIX

The pertinent provision of the Emergency Price Control Act of 1942, as amended (56 Stat. 23; 50 U. S. C. App., Supp. V, Secs. 901-946), are:

Sec. 3 (e), as originally enacted:

Notwithstanding any other provision of this or any other law, no action shall be taken under this Act by the Administrator or any other person with respect to any agricultural commodity without the prior approval of the Secretary of Agriculture; except that the Administrator may take such action as may be necessary under section 202 and section 205 (a) and (b) to enforce compliance with any regulation, order, price schedule or other requirement with respect to an agricultural commodity which has been previously approved by the Secretary of Agriculture.

Sec. 3 (e), as amended by Sec. 5 (a) of the Act of June 30, 1945, c. 214, 59 Stat. 307:

Notwithstanding any other provision of this or any other law, no action shall be taken under this Act by the Administrator or any other person, without prior written approval of the Secretary of Agriculture, with respect to any agricultural commodity or with respect to any regulation, order, price schedule or other requirement applicable to any processor with respect to any food or feed product processed or manufactured in whole or substantial part from any agricultural commodity; except that (1) the foregoing provisions of this subsection shall not apply in the case of any individual adjustment making an increase in a maximum price, and (2) the Administrator

may take such action as may be necessary under section 202 and section 205 to enforce compliance with any regulation, order, price schedule or other requirement which is lawfully in effect.

Sec. 203 (a), as amended by Sec. 106 of the Stabilization Extension Act of 1944, 58 Stat. 632, and the Supplemental Appropriation Act, 1948, P. L. 271, 80th Cong., 1st Sess., July 30, 1947 (italicized portion added by the Supplemental Appropriation Act, 1948):

At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections, *Provided, however, That a protest setting forth objections to any provisions of such regulation, order, or price schedule with respect to which responsibility was transferred to the Department of Commerce by Executive Order 9841 may not be filed more than one hundred and twenty days after issuance of such regulation, order, or price schedule or sixty days after the enactment of this amendment, whichever is the later.* * * *

Sec. 204 (e), added to the Act by sec. 107 (b) of the Stabilization Extension Act of 1944, 58 Stat. 632, amended by the Act of June 30, 1945, 59 Stat. 307, and the Supplemental Appropriation Act, 1948, July 30, 1947 (italicized portion is the

amendment by the Supplemental Appropriation Act, 1948):

(1) *Within sixty days after the date of enactment of this amendment, or within sixty days after arraignment in any criminal proceedings and within sixty days after commencement of any civil proceedings brought pursuant to section 205 of this Act or section 37 of the Criminal Code, involving alleged violation of any provision of any regulation or order issued under section 2 or alleged violation of any price schedule effective in accordance with the provisions of section 206 with respect to which responsibility was transferred to the Department of Commerce by Executive Order 9841, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated or conspired to violate. The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. * * **

(2) * * * If any provision of a regulation, order, or price schedule is deter-

mined to be invalid by judgment of the Emergency Court of Appeals which has become effective in accordance with section 204 (b), any proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the extent that such proceeding or judgment is based upon violation of such provision. Except as provided in this subsection, the pendency of any protest under section 203, or judicial proceeding under this section, shall not be grounds for staying any proceeding brought pursuant to section 205 of this Act or section 37 of the Criminal Code; nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206.

Sec. 205 (e), as amended by Sec. 108 (b) of the Stabilization Extension Act of 1944, 58 Stat. 632, and Sec. 12 (a) of the Price Control Extension Act of 1946, 60 Stat. 664:

(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. * * * If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days

from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered. * * *